Editor's note: Reconsideration denied by order dated Oct. 22, 1981

UNITED STATES
v.
VERDE MINING CO., INC., ET AL. 1/

IBLA 80-25 Decided August 27, 1981

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring mining claims null and void in contests OR-8839, OR-17967, OR-17968, and OR-17969.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case, the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim

1/ The contestee/appellants are: Anthony (a.k.a. Antonio) Fernandez, Jess E. Minium, Jr., Bertil A. Granberg, Christopher Palzer, Verde Mining Company, Inc., et al.

and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

4. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Lode Claims

Where the land on which a mining claim is located is subsequently closed to mineral entry, the validity of the claim must be determined as of the date of the withdrawal, as well as of the date of the hearing. If there was no discovery as of the date of withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though there might be a discovery at a later date.

5. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Mineral Lands

Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the land embraced by a mining claim is not mineral in character is a normal adjunct to a charge of no discovery.

APPEARANCES: Jess E. Minium, Jr., Esq., Kelso, Washington; William B. Murray, Esq., Portland, Oregon, for appellants. Albert Wall, Esq., U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal is taken from the September 12, 1979, decision of Administrative Law Judge Dean F. Ratzman declaring 27 mining claims 2/ null and void for lack of discovery of valuable minerals.

2/ Contest No. OR-8839 (Wash) involves the 9 Big Falls claims; Contest No. OR-17967 (Wash) involves the 10 Northwestern claims; Contest No. OR-17968 (Wash) involves the 6 Rock Point claims; and Contest No. OR-17969 (Wash) involves the 2 Green River claims.

The Oregon State Office, Bureau of Land Management (BLM), instituted contest Nos. OR-8893, OR-17967, OR-17968, and OR-17969 on behalf of the Forest Service. All the complaints charged that the claims contained no minerals in sufficient quantities to constitute a valid discovery and that the lands embraced by the claims were nonmineral in character. In addition, the complaints in OR-17967, OR-17968, and OR-17969 allege no discovery on certain claims situated on parcels of land segregated on June 18, 1970, February 18, 1972, and December 20, 1976, by exchange applications.

The contestees answered the charges and on March 27, 1979, a hearing was held before Judge Ratzman in Portland, Oregon.

[1-5] We have thoroughly reviewed the record in this case and the arguments advanced by the parties. Judge Ratzman's decision sets out a full summary of the testimony, the relevant evidence, and the applicable law. We agree with the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of it is attached hereto as appendix A.

One of appellants' arguments on appeal concerns the issue of discovery. The issue was exhaustively considered by Judge Ratzman and was properly decided by him adversely to appellants. Appellants' lengthy review of the issue demonstrates no error in the Judge's decision and needs no further discussion herein.

Appellants' other argument on appeal challenges the contest complaint assertions that the claims are located on public lands of the United States. Appellants aver that the lands in the subject claims "were segregated by mineral entry in the early 1900's." They argue that the claims have since been patented, are private property, and not subject to the jurisdiction of the United States. Referring to plat maps of the claims (contest Exhs. 3, 4, 5, and 6), appellants allege that the plat maps bear an official stamp "patent issued." Appellants also assert that it is impossible to tell from Judge Ratzman's decision "what lands were patented and what lands are claimed not to be patented, which claims are null and void and which are not." 3/ Appellants controvert the ownership of the lands encompassing the claims and contend that the Government has failed to prove such ownership and that the proceedings should therefore be dismissed. In diametric opposition appellants argue that the Government should stop interfering with their claims and should issue patent. Appellants further contend that the Government failed to prove a material allegation of the complaint in that it failed to demonstrate that the lands embraced by the claims are nonmineral in character. Appellants have also moved to dismiss the proceedings on this ground. In support, appellants cite Dixie Queen Mining Company v. Northern Pacific Railway Company, an unreported general land office decision of February 21, 1917, wherein the commissioner

3/ Brief of William B. Murray, Esq., at 17.

found the lands covered by certain of the mineral surveys involved herein to be mineral in character. 4/

Having thoroughly reviewed the maps, plats, and other pertinent documents, we conclude that appellants' contentions concerning the status of the lands here in issue are without basis in fact. There is no indication that at any time during the proceeding, the agencies involved, or Judge Ratzman attempted to exercise jurisdiction over non-public lands. The title and encumbrance maps and the master title plats depict the pertinent mineral surveys within their respective sections in relation to neighboring patented lands. Boundaries, acreages, and distinctions between public and private lands are clearly drawn on these maps and appellants' assertions doubting the status of the lands are without merit. The file also contains copies of patents issued for neighboring patented lands, but we have been unable to verify the assertions that the mineral survey plats bear the stamp "patent issued." Judge Ratzman specifically ruled -- and we have adopted his decision as our own -- that his findings that the claims were null and void affected the claims only to the extent that they are located on public land. Naturally his decision does not apply to any parts of the claims situated on lands other than public lands.

Appellants' assertion that the lands involved were held in 1917 to be mineral in character is summarily disposed of. Whether lands embraced by a mining claim are mineral in character is an issue which remains open to investigation and determination by the Department until a patent issues. United States v. Bohme, (Supp.), 51 IBLA 97, 87 I.D. 535 (1980). The charge in a contest complaint that the lands embraced by mining claims are nonmineral in character is the normal adjunct to a charge of no discovery. The mineral character of lands

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4/ Appellants' exhibit "A" is a copy of this decision. In a posthearing order dated Oct. 9, 1979, denying appellants' motion for reconsideration the Judge evaluated the probative worth of this document as follows:

"Because Exhibit A was concerned with (i) the question of the mineral character of lands, not with the issue of whether discoveries of valuable minerals existed, (ii) assays of samples taken more than fifty years ago from locations which may not be the same as openings or workings which exist at the present time, and (iii) activities of persons who engaged in sampling more than fifty years ago and were not made available for cross-examination, that exhibit cannot be deemed to be significant or important in this proceeding. It makes no difference whether portions of the old Decision were faint or difficult to read. A review of its general nature and content made in a relatively short period of time reveals that Exhibit A cannot be given any weight when the issue raised by Paragraph 5(a) of the Complaint is considered. The Motion indicates that Exhibit A was the "primary evidence relied upon" by the mining claimants. It is not conceivable that a document of that age, concerning a collateral issue, and containing information provided by persons who are not available for cross-examination, could constitute the basis for a determination in favor of the mining claimants."

may be established by inferential evidence engendering the belief that the lands contain minerals of such quality and quantity as to render extraction profitable and justify expenditure to that end. "Mineral character" must be distinguished from the sine qua non for a valid mining claim on public lands, which is the demonstration of a valuable mineral deposit within the limits of the claims. United States v. Corns, 53 IBLA 5 (1981); Edith Szmyd, 50 IBLA 61 (1980). The Government need not prove every allegation in a contest complaint. The Government may rest its case on the proof of one or more allegations. Accordingly, appellants' motion to dismiss the complaints on the ground the Government failed to prove that the lands in issue are nonmineral in character is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge

APPENDIX A

September 12, 1979

United States of America,	:	Contest No. OR-8839 (Wash.)
	:	Involving the Big Falls claims
Contestant	:	
	:	Contest No. OR-17967 (Wash.)
v.	:	Involving the North Western
	:	claims
	:	
Anthony (aka Antonio)	:	Contest No. OR-17968 (Wash.)
Fernandez, Jess E. Minium, Jr.,	:	Involving the Rock Point claims
Bertil A. Granberg, Christopher	:	
Palzer, Verde Mining	:	Contest No. OR-17969 (Wash.)
Company, Inc., et al.	:	Involving the Green River claims
	:	
Contestees	:	

DECISION

Appearances: Albert Wall, Attorney, Office of the Regional Counsel,
U.S. Department of Agriculture, Portland, Oregon,
for the Contestant.

Jess E. Minium, Jr., Attorney, Kelso, Washington,
for Verde Mining Company and Jess E. Minium, Jr.,
Contestees.

William B. Murray, Attorney, Portland, Oregon,
for Christopher Palzer, Contestee.

Before: Administrative Law Judge Ratzman

Pursuant to the Hearings and Appeals Procedures, 43 CFR Part 4, the Oregon State Director, Bureau of Land Management, Department of the Interior initiated this contest on behalf of the United States Forest Service (USFS). A Complaint was initially filed on December 29, 1971. A timely Answer was submitted by Verde Mining Company through its attorney, Jess E. Minium, Jr. on January 19, 1972. Thereafter, two Complaints were filed in 1977 and 1978, adding Jess E. Minium, Jr. and Bertil A. Granberg as contestees. All Complaints allege that:

a. Minerals have not been found within the limits of each of the above-named mining claims in sufficient quantities to constitute a valid discovery.

b. The land embraced by the claims is nonmineral in character.

The 1977 and 1978 Complaints further contend that there was no valid discovery on certain claims that are situated on parcels of land segregated on June 18, 1970, February 18, 1972 and December 20, 1976, in anticipation of a proposed land exchange.

Timely Answers in response to the above Complaints were filed. Contestee Bertil A. Granberg, affirmatively pleaded that the Government should be estopped from bringing this action. A hearing was held in Portland, Oregon on March 27, 1979. At that time an appearance was made by counsel representing Mr. Christopher Palzer. Mr. Palzer's counsel represented that his client had succeeded to the interests owned by Mr. Granberg. The latter had acquired interests in the contested claims by purchasing them in bankruptcy proceedings. Attorney Minium represented the interests of the contestees other than Mr. Palzer.

The claims are located near the upper Green River within the Gifford Pinchot National Forest in the southwestern part of Washington State.

Mr. Zean R. Moore, a mining engineer with the USFS, testified he has had over 25 years of mining experience. Tr. 11. He has worked as a miner and mining geologist for several large mining concerns, and has examined mining claims for Federal agencies since the fall of 1957. He examined the

Northwestern group of claims on July 1, 1970 and found practically no evidence of any mine workings. Tr. 13. The Big Falls, Green River and Rock Point claims were inspected on August 10 to August 14, 1970. Tr. 15. Available BLM records indicate to Mr. Moore that each of the contested claims is unpatented.

In 1972 Mr. Anthony Fernandez proposed that a joint examination be made, but when arrangements were made he failed to appear. Tr. 15. On November 29, 1972 another examination was made and Mr. Moore found an adit where work had been performed on the Rock Point No. 1 claim near the Green River. Two samples were taken from the adit.

The mining claims are situated in the Cascade Mountain Range in the vicinity of Mt. St. Helens, an inactive volcano which is post-glacial or post-Pleistocene in age. The rocks underlying the claims appear to be a northwest-ward-dipping andesite flow of Eocene-Oligocene age of unknown thickness. Ex. E; Tr. 22. Mr. Moore's examination of available literature did not reveal references to mining operations or production in the area of the claims.

The area was initially prospected and mined more than 75 years ago. Many claims were located but few ever went to patent. Some claims to the east of the subject claims did go to patent. The Duval Corporation has a mining property up the Green River, and is exploring for porphyry copper deposits. Tr. 22. On the contested claims, except for the adit on the Rock Point No. 1 claim which has been mentioned, one can see only "the green and the forest," due to the long period of inactivity. Tr. 74.

Mr. Moore could find only a few of the original discovery points on the claims during his 1970 examinations. These discovery points were just shallow depressions covered by brush. There was no evidence of mining activity except on the Northwest #5 claim which contained some caved adits and old buildings. Tr. 23. His USFS Mineral Examination Report (Ex. E) stated that nothing of a mineral nature was found on the Northwestern group of lode claims, hence no samples were taken from them. Mr. Moore observed a heavy growth of brush and old log buildings in a state of disrepair on the claims. After inspecting all of the Northwestern lode claims, Mr. Moore concluded there was no evidence of a discovery of a mineral deposit on any of those claims. Tr. 25.

Mr. Moore's mineral examinations of the nine Big Falls lode claims also failed to uncover any mineralization on those properties. A caved discovery cut and several old caved-in adits along the Green River on the Big Falls No. 5, No. 6 and No. 7 claims were found. The entrances appeared unsafe to enter. No mineralization was seen around the cut, or in the portal area or the dump in front of the adits. Tr. 25. No indication of recent mining activity was found on the Big Falls group. The area was covered with heavy brush. Ex. E.

On the basis of his examination in 1970, Mr. Moore stated that a prudent person would not attempt to operate the Green River group of lode claims. Tr. 28.

On November 29, 1972, several samples were taken from an adit which had been opened on the Rock Point No. 1 lode claim. Tr. 28. The adit was partially filled with water, and a high water line can be seen above it. Ex. E. A small vertical 16-inch wide quartz vein was found at the face. The wall rock is dark gray andesite. The samples contained negligible amounts of gold and silver. One sample produced no copper while the other disclosed .283 percent copper. Ex. E. and Ex. 7. According to Mr. Moore the mineral content of these samples is poor. He tried to take samples from the areas that revealed the best showings. Tr. 34. Only two narrow stringers appeared to have mineral values. He believes that a prudent man would not be justified in expending time and money in an effort to develop a valuable mine on the Rock Point No. 1 claim -- that was the only one of the contested claims where he found mineralization which he thought was worth sampling. Tr. 39.

On cross-examination, Mr. Moore stated that geophysical and geochemical testing might show that there is an ore deposit at depth. Tr. 45. He reaffirmed his earlier statement that there is no physical evidence to demonstrate the existence of a discovery on any of the claims. Tr. 50. It is Mr. Moore's belief that a prudent person must have a chance at making a profit before he would develop a claim. The actual ability to recover a profit is a factor in his analysis -- a reasonable prospect of success rather than a certain prospect is the appropriate factor. Tr. 51, 97.

In order to have a commercially minable deposit of copper an average grade of .66 percent is desirable although some mines operate on a .35 percent grade. Tr. 61. The normal operation for low grade copper is open pit mining involving a "good many million tons" of the material. Tr. 62.

Applicable Law

Under the mining laws of the United States [30 U.S.C. Sec. 22, et seq. (1976)], the discovery of a valuable mineral deposit is essential if a claim is to be held valid. There must be found within the limits of a lode mining claim a vein or lode of quartz, or other rock in place, bearing mineral of such quantity and quality that a prudent person would expend his time and means with a reasonable prospect of success in developing a valuable mine. Converse v. Udall, 399 F.2d 616, 621 (9th Cir. 1968) cert. denied, 393 U.S. 1025 (1969); Barton v. Morton, 498 F.2d 288 (9th Cir.) cert. denied, 419 U.S. 1021 (1974); United States v. Robert A. Rukke, et al., 32 IBLA 155 (1977).

In a mining contest the mining claimant is the proponent of a rule or order that he has complied with the mining laws, and has the ultimate burden of proof. The Government assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. When this has been done the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Alex Bechthold, 25 IBLA 77, 82 (1976).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Alex Bechthold, supra; United States v. Fisher, 37 IBLA 80 (1978). The function of the Government mineral examiner is to verify, if possible, the existence of a discovery by examining the claim and by extracting mineral samples from accessible areas of exposed mineralization at which the claimant alleges a discovery to have been made. United States v. Arizona Mining and Refining Co., Inc., 27 IBLA 99, 107 (1976). A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current

workings of a claim. It is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner. United States v. Timm, 36 IBLA 316 (1978); United States v. Florence J. Mattox, 36 IBLA 171 (1978). A claimant has the burden of showing not only that a discovery was made, but that it still exists. United States v. Wesley C. Miles, Sr., 36 IBLA 213 (1978).

No weight will be given to a claimant's allegation that the Government's mineral examiner failed to sample the discovery point or the best mineral showings where the claimant was invited to indicate his discovery to the examiner and failed to do so, and where he also failed to introduce convincing evidence to overcome the Government's case. See United States v. Timm, 36 IBLA 316 (1978).

Where a mining claim occupies land which has subsequently been withdrawn from the operation of the mining laws the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing. If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market. United States v. Rodgers, 32 IBLA 77, 84 (1977); United States v. Garner, 30 IBLA 42, 66 (1977); United States v. Milton Wichner, 35 IBLA 240 (1978).

The testimony and other evidence submitted by the Government's expert witness have established a prima facie case that there are no mineral deposits exposed on any of the mining claims which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of successfully developing a valuable mine. The mineral examiner has been on each of the contested claims and has found no valuable mineral deposits exposed thereon. Assay results for samples taken from the only mineralized areas which have been exposed in recent years reveal low values not worthy of development.

The contestees have not submitted substantial evidence to refute the Government's prima facie case, and have not met their burden of establishing a discovery of a valuable

mineral by a preponderance of the evidence. Although the contestees insist that the mineral examiner should have sampled all of the claims, this requirement is contrary to the Departmental decisions holding otherwise. E.g. United States v. Fisher, 37 IBLA 80 (1978).

I am not convinced that Mr. Moore employed an improper standard in formulating his opinions on the lack of discovery on the claims. At one point he indicated that a miner would have to make a profit. However, he did not base his opinion solely on the necessity of an actual profitable recovery of minerals from the claims. Since he has been on each of the claims and found no valuable exposed mineral deposits, and saw signs of recent mining activity only at one location, Mr. Moore did have the requisite foundation to express his expert opinions.

Accordingly, the nine Big Falls claims, ten Northwestern claims, six Rock Point claims, and two Green River claims, the subjects of the Complaints in the four contests under consideration, are hereby declared null and void. 1/

Dean F. Ratzman
Administrative Law Judge

1/ Documents in the official file as well as statements in the contest Complaint (OR-17969) reveal that parts of the Big Falls and Green River claims were located on patented land not under the jurisdiction of the Department of the Interior. To the extent that any of the claims were located on non-public land, this Decision will have no effect.